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**Supreme Court of the United States**

OCTOBER TERM, 1946

**No. 1181**

**ETHEL S. PAULING,**  
*Petitioner and Appellant below,*

*vs.*

**LORETTE PAULING,**  
*Respondent and Appellee below.*

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT AND BRIEF IN SUP-  
PORT THEREOF.**

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# Supreme Court of the United States

OCTOBER TERM, 1946.

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No. \_\_\_\_\_

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**ETHEL S. PAULING,**  
*Petitioner and Appellant below,*

*vs.*

**LORETTE PAULING,**  
*Respondent and Appellee below.*

---

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT AND BRIEF IN SUP-  
PORT THEREOF.**

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*To the Honorable, the Chief Justice and the Associate  
Justices of the Supreme Court of the United States:*

Ethel S. Pauling, petitioner, respectfully shows:

That she is greatly aggrieved by the final judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in this cause on January 6, 1947 (petition for rehearing denied January 31, 1947), by which said Circuit Court of Appeals affirmed the judgment of the United States District Court, District of Minnesota, and that such judgment is erroneous, as is more particularly hereinafter pointed out.

## SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

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The facts in this case are agreed upon and are embodied in an agreed statement of facts (R. 29), two affidavits admitted by agreement in lieu of depositions (R. 28, 29), and the pleadings (R. 1-26). Both parties made motions for summary judgment in the trial court (R. 26, 27). That court sustained the motion of respondent, defendant below (R. 53), writing an opinion, 65 Fed. Supp. 814. The Circuit Court of Appeals for the Eighth Circuit affirmed the judgment of the trial court by its opinion of date January 6, 1947 (R. 68).

The action is to recover certain sums of alimony due and to become due under a decree of divorce entered by the Circuit Court of Cook County, Illinois, on May 13, 1932, whereby petitioner was divorced from her then husband one John W. Pauling (R. 13), who died on January 17, 1945 (R. 3).

The decree was a consent decree and was signed at the foot thereof by petitioner and Pauling and performed the dual function of

(a) A decree, and

(b) A contract between the parties (R. 17).

Pauling left no will and, so far as respondent knows, there will be no probate of Pauling's estate for the reason that, she claims, he left nothing that was subject to probate (R. 37). He in fact left life insurance payable to respondent in the aggregate sum of \$55,756.90 (R. 35-37) and personal property of the aggregate value of \$16,545 (R. 34, 35), or an aggregate of \$72,301.90.

Respondent, defendant below, was the second wife and is the widow of Pauling, deceased, and has taken possession of all of this property, claims it is hers and proposes to convert the same to her own use from time to time as she sees fit (R. 37). She contributed nothing toward the acquisition of this property (R. 37).

The action, while in form an action *in personam* against respondent, is, in essence and effect, an action *in rem* against the property in the possession of respondent.

It was agreed in the court below that petitioner was entitled to recover at least something if Pauling left any estate (Opinion court below, R. 55). However, the Circuit Court of Appeals held in effect that there could be no recovery even if Pauling left an estate.

The theory of respondent is that the \$55,000 of life insurance is all exempt under Minnesota law and that the \$16,000 of personal property, being held in joint tenancy, passed to her by survivorship free and clear of Pauling's debts.

The theory of petitioner is that none of the life insurance is exempt under the Minnesota statutes *to respondent* or, if any, not to exceed \$10,000 and that the life insurance is property and, being property, it is within the fraudulent conveyance rules as codified by a committee of the American Bar Association and adopted in about half of the States, including the State of Minnesota, in the year 1922; and that the \$16,000 of personal property held in joint tenancy is likewise within the fraudulent conveyance rules. In short, the case is a fraudulent conveyance case based upon a debt in favor of petitioner created by the decree of divorce. That petitioner is a creditor of the Pauling estate was found by the court below (R. 69).

It is further the theory of petitioner that where a man, as in this case, though solvent in his lifetime, by convey-

ances to his wife, either in the form of creating joint ownership in himself and wife with survivorship in her or in the form of life insurance payable to her, puts all of his property in such shape that in case of his death his estate will be insolvent, this situation presents a case of fraudulent conveyances within the meaning of the following language in the Uniform Fraudulent Conveyance Act:

“Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent, if the conveyance is made or the obligation is incurred without a fair consideration.”

2 Minn. Stat. 1941, Sec. 513.23, p. 3365, January 1, 1922, or

2 Mason, Sec. 8478.

The sums sought to be recovered under the decree of divorce are:

1. \$250 a month, beginning with the month of February, 1945, when the first default occurred, being the month following the month in which Pauling died (R. 30), “as long as said complainant” (petitioner here) “shall live” (R. 16).

Recovery under this item is denied by the court below on the theory that the Pauling property is not liable for installments falling due after his death (R. 76).

2. The value of a \$5,000 policy of life insurance on Pauling's life which he agreed to furnish petitioner in lieu of a \$4,500 policy provided for in the decree of divorce (the total life insurance on Pauling's life provided for in the decree was \$24,500 (R. 16)) which petitioner delivered to Pauling upon his representation that he would replace the policy with a \$5,000 life insurance policy, which he never did (R. 31).

- Recovery under this item is denied by the court below

on the theory that petitioner was guilty of laches in not applying to the Circuit Court of Cook County, Illinois, for relief, although the word "laches" is nowhere used in the opinion (R. 71, middle of page).

Pauling deliberately lied to petitioner about this \$5000 policy. In the year 1934 he wrote to her:

"I hope to get the \$5,000 back about the first of the year. If anything happens to me, you know it is being held by the Penn Mutual Life Ins. Co. (L. Buchanan) Minneapolis." (R. 33.)

It is agreed in the agreed statement of facts that Mr. Noonan [the attorney for the appellee] interviewed L. Buchanan and that Mr. Buchanan told Mr. Noonan that "he was unable to give any information relative to this \$5,000 policy; that he has no record concerning this transaction and does not know what Mr. Pauling was referring to in this connection, and it may be assumed for the purposes of this case that Mr. Buchanan's statement just related is correct." (R. 33.)

This statement in the letter of 1934 that the \$5,000 policy was in the possession of Mr. Buchanan was not a promise *but a deliberate false statement of an existing fact.*

3. \$12,903.25 being the excess of his income over \$12,000 for the years 1936-1944, inclusive, under the following provisions of the decree:

"\* \* \* defendant also agrees that in the future as his income from his business increases that the said complainant will receive on a percentage basis twenty-five percent (25%) of the defendant's income, always receiving a minimum of Two Hundred and Fifty Dollars (\$250.00) per month." (R. 15.)

Recovery under this item is denied on the apparent theory that this provision in the decree is inoperative and void because it is not embodied in the decreeing portion of the decree (R. 76, bottom of page), and upon the further

theory that petitioner was guilty of laches in not discovering the excess income and demanding payment, although the word "laches" is nowhere used in the opinion (R. 70).

4. \$571.92 being the premiums Pauling failed to pay on the \$20,000 of life insurance which petitioner was permitted by Pauling to retain of the \$24,500 provided for by the decree (R. 31). The decree provided Pauling should pay such premiums and "continue to pay such premiums each and every year in the future" (R. 16).

No reason has ever been suggested by counsel for respondent, or the trial court, or the Circuit Court of Appeals, why this item is not recoverable if Pauling left an estate.

The opinion proceeds upon the theory that in case of a voluntary conveyance by husband to wife without any consideration whatever, the creditor in a fraudulent conveyance case must prove **actual, as distinguished from constructive intent to defraud** (R. 75, 76) and, by implication, that such proof must be made, not only as to the grantor but as to the grantee as well (R. 73).

The complaint below contained the following:

"Plaintiff claims that full faith and credit should be given to said decree, Exhibit 'A' hereto attached, by the courts of Minnesota under the provisions of Section 1 of Article 4 of the Constitution of the United States, to prosecute this suit as a citizen of the United States under said provisions, and also under the doctrine of comity." (R. 2.)

### **Jurisdiction.**

Jurisdiction of this Court is invoked under Section 240-A of the United States Judicial Code as amended by Act of February 13, 1925, 28 U. S. C. A., Sec. 347.

### Questions Presented.

1. Did the court give full faith and credit to the alimony provisions of the decree of divorce rendered by the Circuit Court of Cook County, Illinois, on May 13, 1932, as similar decrees have been construed by the Supreme Court of Illinois?
2. Is the Pauling estate liable for the \$250 a month alimony after Pauling's death?
3. Is the Pauling property liable for \$5,000, the value of a \$5,000 policy promised petitioner in lieu of a \$4,500 policy surrendered to Pauling, and in this connection,
  - (a) Was petitioner guilty of any laches in not applying to the Circuit Court of Cook County, Illinois, for relief?
  - (b) Must laches be pleaded?
  - (c) Were Pauling and his estate injured by petitioner not having applied to the court for relief?
4. Is petitioner entitled to recover one-fourth of Pauling's excess income over \$12,000 a year for the years 1936-44, inclusive, and in this connection
  - (a) Was it necessary that this provision in the decree be repeated in the decreeing portion of the decree?
  - (b) Was petitioner guilty of laches in not discovering this excess income during Pauling's life and demanding payment?
  - (c) Must laches be pleaded?
  - (d) Was there any injury to Pauling and his estate by the delay in discovering the excess income and demanding payment?
5. Is petitioner entitled to recover the amount of premiums on her insurance policies which Pauling was decreed to pay but failed to pay?
6. In case of a voluntary conveyance by husband to

wife, without any consideration, is it necessary for the creditor in a fraudulent conveyance case to prove affirmatively intent on the part of the grantor husband and the grantee wife to defraud, or is such intent presumed?

7. Is there ample evidence in the record of actual, as distinguished from presumptive, intent to defraud?

8. Is the \$55,756.90 of life insurance payable to respondent exempt to respondent under Minnesota law? If so, how much? and in this connection

(a) Was John W. Pauling the debtor and not the respondent?

(b) Have dead men any exemptions?

(c) Is life insurance property and, therefore, subject to the fraudulent conveyance rules?

9. Is the case of *Ross v. Minnesota Life Insurance Co.*, 154 Minn. 186, 191 N. W. 428, 31 A. L. R. 46, in which it is held that a person, though insolvent "may devote a moderate portion of his earnings to insure his life in favor of his wife" applicable to the facts of this case?

10. Is the case of *Irvine v. Helvering*, 99 Fed. 2nd 265, (U. C. C. A. 8th) applicable to the facts in this case? and, in this connection

(a) Is the creation of a joint tenancy or a tenancy by entirety within the fraudulent conveyance rules?

11. Where a man, as in this case, though solvent in his lifetime, by conveyances to his wife, either in the form of creating joint ownership in himself and wife with survivorship in her or in the form of life insurance payable to her, puts all of his property in such shape that in case of his death his estate will be insolvent, does this present a case of fraudulent conveyances within the meaning of the fraudulent conveyance rules as embodied in the Uniform Fraudulent Conveyance Act?

12. Is petitioner—as an alternative theory—entitled to

recover premiums paid by Pauling on respondent's life insurance, which with interest computed to January 1, 1945, amounts to \$33,045.97?

13. Did the court below unwarrantably pile presumptions upon presumptions to nullify the decree, which is also a contract?

14. Should the pleadings in this case "be so construed as to do substantial justice"?

### **Reasons Relied Upon For Allowance of Writ.**

1. The court denied full faith and credit to the alimony provisions in the decree of divorce.

2. The court decided sundry important questions of local law in a way probably in conflict with applicable local decisions, as is more fully set forth in the annexed brief.

3. The court "so far departed from the accepted and usual course of judicial proceedings . . . as to call for the exercise of this court's power of supervision."

The court did this in the following respects: It wholly ignored and refused to consider the following fundamental propositions in the case:

(a) The decree of divorce as to the provisions for alimony, being signed by the parties at the foot thereof (R. 17) constitutes a contract between the parties which is valid and binding on Pauling and his estate, the property that he left, which is now in the possession of respondent.

(b) This action, while in form an action *in personam* against Lorette Pauling, respondent, is, in essence and effect, an action *in rem* against property in the possession of respondent.

(c) There is overwhelming evidence in the record of actual intent on the part of Pauling to defraud his first wife (R. 31-34).

(d) The creation of a joint tenancy or a tenancy by entirety is within the fraudulent conveyance rules.

(e) Where a man, as in this case, though solvent in his lifetime, by conveyances to his wife, either in the form of creating joint ownership in himself and wife with survivorship in her or in the form of life insurance payable to her, puts all of his property in such shape that in case of his death his estate will be insolvent, this situation presents a case of fraudulent conveyance within the meaning of the fraudulent conveyance rules.

4. The court decided an important question of federal law which has not been but should be settled by this court.

This the court did by holding in effect that petitioner could not recover the \$5,000 policy agreed to be furnished to her in lieu of the \$4,500 policy and could not recover the \$12,903.25 excess income because of laches on the part of petitioner (although the word "laches" is nowhere used in the opinion), notwithstanding the fact that laches was not pleaded by respondent as required by this court's Rule 8 (c) which reads as follows:

"In pleading to a preceding pleading a party shall set forth affirmatively \* \* \* laches."

In other words, this court, by its decision, should settle the question whether or not this rule means what it says.

While the court nowhere uses the words "estoppel" or "waiver" in the opinion, the last page of the opinion proceeds upon the theory that, having failed for 13 years to assert her rights which she now claims and Pauling having failed to recognize these rights, petitioner has thereby been estopped from asserting her rights and, consequently, has waived these rights. Attention is directed to the fact that, under Rule 8 (c), not only must laches be pleaded, but also "estoppel" and "waiver." Does this Rule as to "estoppel" and "waiver" mean what it says?

**Prayer For the Writ.**

WHEREFORE, Petitioner prays this Court for an issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review its final judgment in the above entitled cause.

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and

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Stinchfield, Mackall, Crounse &

Moore,

1100 First National-Soo Line Bldg.,

Minneapolis 2, Minnesota,

*Counsel for Petitioner.*

# Prayer For the Wild

When the first light dawns, the first for an hour,  
 of a winter's day, the first for an hour,  
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# Supreme Court of the United States

OCTOBER TERM, 1946.

No. \_\_\_\_\_

ETHEL S. PAULING,

*Petitioner and Appellant below,*

vs.

LORETTE PAULING,

*Respondent and Appellee below.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### Opinion Below.

Trial Court, 65 Fed. Supp. 814.

Opinion United States Circuit Court of Appeals not published at this writing.

### POINT I.

## THE DECREE FOR ALIMONY IS ENTITLED TO FULL FAITH AND CREDIT.

The court below, in denying recovery to petitioner, refused to give full faith and credit to the decree for alimony in favor of petitioner as required by Section I of Article 4 of the Constitution of the United States. This right was specifically claimed in the complaint (R. 2, par.

3). *Sistare v. Sistare*, 218 U. S. 1, 16; *Yarborough v. Yarborough*, 290 U. S. 202, 212, 213; *Loughran v. Loughran*, 292 U. S. 216, 227, 228.

This provision of the Constitution is binding on the federal courts as well as the state courts. *Loughran v. Loughran*, 292 U. S. 216, 228.

## POINT II.

### THE DECREE FOR \$250 A MONTH ALIMONY IS ENTITLED TO FULL FAITH AND CREDIT AND IS BINDING AFTER PAULING'S DEATH.

The court below erroneously denied full faith and credit to that part of the decree for alimony which provided that John W. Pauling should pay petitioner \$250 a month "as long as said complainant shall live" (R. 16) on the apparent ground that "... nor did it (the decree of divorce) in terms provide that his estate should be liable for \$250 a month after Pauling's death" (R. 76). This holding is in direct conflict with the opinion of the Supreme Court of Illinois (the court of last resort of the State where the decree was rendered) in the parallel consent decree case of *Storey v. Storey*, 125 Ill. 608, in which it was held that the estate of a deceased husband was liable for installments falling due after the husband's death. That Pauling's estate, if he left any, was liable for installments falling due after Pauling's death was admitted by counsel for respondent in his brief in the court below, in the following language:

"Had Pauling left an estate there probably exists no question but that appellant would have been entitled to recover from the estate \$250 a month as long as she lived. *Storey v. Storey* (Illinois) 18 N. E. 329; 125 Ill. 608." (Appellee's Brief, 28; see certified copy on file).

The amount recoverable under this provision is either

(1) The present worth of \$250 a month beginning February 1, 1945 (when the first default occurred) during petitioner's expectancy of life of 16.28 years, which sum is agreed to be \$33,883.25 (R. 29), under the doctrine of anticipatory breach as that doctrine is enunciated by the Supreme Court of Minnesota in *Walsh v. Mankato Oil Co.*, 201 Minn. 58, 275 N. W. 377, 380;

Or

(2) The amount of the installments due at the time of the decree in favor of petitioner is entered, and a further decree that petitioner be paid \$250 a month thereafter "as long as she shall live."

### POINT III.

**THE PROVISION IN THE DECREE FOR \$24,500 OF LIFE INSURANCE IS ENTITLED TO FULL FAITH AND CREDIT AND PETITIONER WAS NOT GUILTY OF LACHES. FURTHERMORE, LACHES WAS NOT PLEADED.**

The court below erroneously denied full faith and credit to that part of the decree of divorce which provides that petitioner shall have \$24,500 of life insurance on Pauling's life and that Pauling shall pay the premiums thereon. (R. 16). At the time of the entry of the decree Pauling furnished petitioner the \$24,500 of life insurance on his life. Later petitioner surrendered a \$4,500 policy on Pauling's representation that he would replace it with a \$5,000 policy, which he never did (R. 31).

The reasons for refusing recovery on this item are not clear from the opinion but apparently the ground is laches in not having applied to the Circuit Court of Cook County, Illinois for an order compelling delivery to petitioner of the \$5,000 policy, although the word "laches" is nowhere used in the opinion.

Laches was not pleaded as required by Supreme Court Rule 8 (c) which reads: "In pleading to a preceding pleading a party shall set forth affirmatively . . . laches." Furthermore, there was no laches, as conclusively appears from paragraphs 3, 4, 5 and 6 of the agreed statement of facts (R. 31-33, inclusive), and the affidavit of Stanley B. Pauling (R. 28).

Neither estoppel nor waiver was pleaded as required by Rule 8 (c).

Nor is there any hint in the record of any injury to Pauling or his estate by reason of petitioner not having applied to the Circuit Court of Cook County for an order; therefore, laches would not have been available if pleaded. *Coates v. Cooper*, 121 Minn. 11, 140 N. W. 120. **The delay in the Coates case was more than 15 years** after the cause of action accrued but was without injury and, therefore, laches was held not available.

#### POINT IV.

#### **THE PROVISION IN THE DECREE FOR ONE-FOURTH OF PAULING'S INCOME IS ENTITLED TO FULL FAITH AND CREDIT.**

The court below erroneously denied full faith and credit to that part of the decree of divorce which required Pauling to pay petitioner 25% of his income (R. 15). This provision did not become applicable until his yearly income exceeded \$12,000, arrived at thus: 12 times \$250 a month, \$3,000 and 4 times \$3,000, \$12,000.

It is agreed that the amount recoverable under this provision, for the years 1936 to 1944, inclusive, is \$12,903.25 (R. 33, 34). Recovery under this item was denied apparently on two grounds:

1. That this provision was not embodied in the decree-

ing part of the decree (R. 76). As said by the Supreme Court of Illinois (the court of last resort of the State where the decree was entered): "When they (husband and wife) agree upon alimony the court will embody the agreement in its decree and it will thereafter conclude the parties." *Smith v. Smith*, 334 Ill. 370, 166 N. E. 85, 88. This is exactly what was done in this case. To say that a court deliberately embodies a plain and unambiguous provision in a decree and that it has no meaning is a solecism.

2. Laches (R. 77), although the word laches is nowhere used in the opinion. Laches was not pleaded as required by Supreme Court Rule 8(c). The record shows no laches; and, if pleaded, laches would have been unavailing for the further reason there is no showing of injury due to delay. *Coates v. Cooper*, 121 Minn. 11, 140 N. W. 120.

Neither estoppel nor waiver is pleaded (Rule 8 (c)). If petitioner is not guilty of any laches, is not estopped to assert her rights and has not waived any of her rights, why may she not recover this item?

#### POINT V.

**THE COURT ERRONEOUSLY DENIED FULL FAITH AND CREDIT TO THAT PART OF THE DECREE OF DIVORCE WHICH REQUIRED PAULING TO PAY THE PREMIUMS ON THE LIFE INSURANCE PAYABLE TO PETITIONER (R. middle p. 16).**

This Pauling failed to do by the sum of \$571.92 (R. 31, par. 4). No defense of any kind has ever been suggested by counsel for respondent, or the trial court, or the Circuit Court of Appeals, to this item except the general defense hereinafter to be considered—that Pauling left no estate.

## POINT VI.

**THE OPINION BELOW PROCEEDS UPON THE FUNDAMENTALLY ERRONEOUS THEORY THAT IN THE CASE OF A VOLUNTARY CONVEYANCE BY HUSBAND TO WIFE, WITHOUT ANY CONSIDERATION WHATEVER, THE BURDEN OF PROOF RESTS UPON THE CREDITOR IN A FRAUDULENT CONVEYANCE CASE TO PROVE AFFIRMATIVELY ACTUAL INTENT, NOT ONLY ON THE PART OF THE GRANTOR BUT ALSO OF THE GRANTEE WIFE, TO DEFRAUD THE HUSBAND'S CREDITORS.**

The attention of the court is directed to the language in the Fraudulent Conveyance Act:

"Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors **without regard to his actual intent**, if the conveyance is made or the obligation is incurred without a fair consideration." (Blackface type emphasis ours.)

(2 Minn. Stat. 1941, Sec. 513.23, p. 3365, January 1, 1922, or 2 Mason Sec. 8478.)

In the case of *Lind v. Johnson*, 204 Minn. 30, 282 N. W. 661, 119 A. L. R. 940, it is said at page 944 of A. L. R.:

"Important too is the fact that the transfers from husband to wife 'are presumptively fraudulent as to existing creditors. The burden is on her to show good faith and a valuable consideration paid by her, or by some one in her behalf.' 3 Dunnell Minn. Dig. (2 ed. & Supps.) Section 3859."

119 A. L. R. 944.

In the case of *State Bank v Swenson*, 197 Minn. 425, 267 N. W. 366, the court said concerning a conveyance held to be fraudulent under the provisions of the Uniform Fraudulent Conveyance Act:

"Many cases have been before this court involving the issue here presented. Thus in *Minneapolis Stock-Yards & Packing Co. v. Halonen*, 56 Minn. 469, 471, -57 N. W. 1135, this court said:

"\* \* \* it is well settled that such is the community of interest between husband and wife, and purchases and conveyances are so often made as a cover for a debtor's property, are so frequently resorted to for the purpose of withdrawing his property from the reach of his creditors and preserving it for his own use, and furnish such temptations for fraud, that they require close scrutiny.

"In a contest between the wife and the creditors of a husband there is, and there should be, a presumption against her which she must overcome by affirmative proof. Such has always been the rule of the common law, and the rule continues, though statutes have modified and changed the relations which at common law existed between husband and wife as to the property of the latter. *Seitz v. Mitchell*, 94 U. S. 580 (24 L. ed. 179). Without going any further than is necessary for a determination of this case, we are of the opinion that where a judgment is upon a claim which accrued prior to a conveyance to his wife of property belonging to the debtor husband, which property the creditors are trying to reach, the burden of proof is upon the wife to show the purchase by clear and satisfactory evidence, and that it was for a valuable consideration, paid by her or by some one in her behalf.'" 197 Minn. 428.

The court below cites Mason's Minnesota Statutes 1927, Section 8470 (Opinion Note 3 bottom p. 75) to the proposition that "the question of fraudulent intent \* \* \* shall be deemed to be a question of fact."

Section 8470 of Mason's Minnesota Statutes of 1927 cited by the court first appears in the Minnesota Statutes of 1849-1858, Chapter 51, Sec. IV, page 459, and it is recited in Sec. I of that Chapter that it is an amendment to an Act of 1853 and, while the Session Laws of Minnesota of 1853 are not available to the writer, apparently this section was passed in 1853 but certainly not later than 1858, and,

of course, the Uniform Fraudulent Conveyance Act, which took effect January 1, 1922, above quoted supersedes the Act of 1853.

It was the purpose, of course, of the Uniform Fraudulent Conveyance Act, prepared by an eminent committee of the American Bar Association, to codify the law of fraudulent conveyances throughout the United States and also to correct contradictions in the laws and decisions of the various states on this subject.

In this connection the court cites the case of *Engenmoen v. Lutroe*, 153 Minn. 409, 190 N. W. 894, 895, to the proposition that "the question of fraudulent intent is a question of fact and not of law" (R. 75, last paragraph).

The court overlooked the fact that in this case the Supreme Court of Minnesota was careful to say:

"It may not be amiss to note that the transactions here involved took place before chapter 415, Laws of 1921, known as the Uniform Fraudulent Conveyance Act, went into effect."

(190 N. W. top r. h. col., p. 895.)

The Supreme Court of Minnesota thereby clearly intimates that under the uniform fraudulent conveyance law the question of fraudulent intent, in the absence of evidence one way or the other, is a question of law and not a question of fact and the fraudulent conveyance law says such conveyance is fraudulent "without regard to his intent."

The court says in its opinion: "Appellee had no actual knowledge of the terms of the decree. She never saw the decree until after the institution of this action" (R. 73). Apparently the court deemed this fact important notwithstanding the Supreme Court of Minnesota has said:

"\* \* \* we are of the opinion that where a judgment is upon a claim which accrued prior to a conveyance

to his wife of property belonging to the debtor husband, which property the creditors are trying to reach, the burden of proof is upon the wife to show the purchase by clear and satisfactory evidence, and that it was for a valuable consideration, paid by her or by some one in her behalf."

*State Bank v. Swenson*, 197 Minn. 425, 428; 267 N. W. 366.

Furthermore, lack of knowledge on the part of a wife as to the debts of the husband is not available to her as a defense.

"But in all cases where the rights of creditors or purchasers in good faith come in question *each spouse shall be held to have notice of the contracts and debts of the other as fully as if a party thereto.*" (Italics ours.)

2 Mason, Section 8621 in chapter on Married Women; March 5, 1869.

## POINT VII.

**APART FROM ANY PRESUMPTION, THERE IS OVERWHELMING EVIDENCE IN THE RECORD OF AN ACTUAL INTENT ON THE PART OF PAULING TO DEFRAUD HIS FIRST WIFE (R. 31-34).**

Pauling induced petitioner to surrender to him the \$4500 life insurance policy under a promise to substitute therefor a \$5000 policy, which he never did although he made many promises to do so between the time the policy was surrendered and 1942 (R. 31).

Pauling deliberately lied to appellant about this \$5000 policy. In the year 1934 he wrote to her:

"I hope to get the \$5,000 back about the first of the year. If anything happens to me, you know it is being held by the Penn Mutual Life Ins. Co. (L. Buchanan) Minneapolis" (R. 33).

It is agreed in the agreed statement of facts that Mr. Noonan [the attorney for respondent] interviewed L. Buchanan and that Mr. Buchanan told Mr. Noonan that

"he was unable to give any information relative to this \$5,000 policy; that he has no record concerning this transaction and does not know what Mr. Pauling was referring to in this connection, and it may be assumed for the purposes of this case that Mr. Buchanan's statement just related is correct" (R. 33).

This statement in the letter of 1934 that the \$5,000 policy was in the possession of Mr. Buchanan was not a promise *but a deliberate false statement of an existing fact.*

Furthermore, it appears in the agreed statement of facts that there was a \$5,000 policy payable to petitioner at the time of the divorce, in addition to the \$20,000 of life insurance that he gave her and which she was allowed to keep and that the beneficiary on this \$5,000 policy was changed by Pauling to his second wife on May 29, 1940 (R. 36). When Pauling told petitioner in his letter of 1934 (R. 33) that a policy of \$5,000 was being held by L. Buchanan for her she had a right to assume that it was the \$5,000 originally made payable to her, which policy is more particularly described in subparagraph (b) of Paragraph 13 of the complaint (R. 36).

As further evidence of actual intent to defraud, the decree (R. 15) provides that complainant (petitioner here) in the divorce case shall have one-fourth of his income, never less than \$250 a month (R. 15). During the years 1936 to 1944, inclusive, his income exceeded \$12,000 (four times the alimony payments of \$250 a month) and he never notified her of that fact, as it was obviously his duty to do.

In a letter Pauling wrote petitioner in the year 1934 he said, among other things:

"I am carrying 25,000 and 6,000 or 31,000, [life insurance] for you" (R. 33).

This was admittedly false; he never carried more than \$20,000 for petitioner after she surrendered to him the policy for \$4,500.

These undisputed facts were entirely ignored by the court below.

### POINT VIII.

**NO PART OF THE \$55,756.90 OF LIFE INSURANCE PAYABLE TO RESPONDENT IS EXEMPT IN THIS CASE UNDER THE MINNESOTA EXEMPTION STATUTES, OR, IF ANY PORTION THEREOF IS EXEMPT, THEN SUCH EXEMPTION DOES NOT EXCEED \$10,000.**

Effective October 1, 1895, the Legislature of Minnesota passed the following statute purporting to exempt all life insurance to the widow:

"Every policy made payable to, or for the benefit of, the wife of the insured, or after its issue assigned to or in trust for her, shall inure to her separate use and that of her children, subject to the provisions of Section 61.14. But the person applying for and procuring the policy may change the beneficiary or beneficiaries, if the consent of the beneficiary or beneficiaries named in the policy is obtained, or if the power so do is reserved in the contract of insurance, or in case of the death or divorcement of a married woman named as beneficiary."

1 Minn. Stat. 1941, Sec. 61.15, page 488, or

1 Mason 1927, Section 3388, page 778.

Laws 1895, Chapter 175 Section 71, p. 429.

By an amendment to the general exemption statute approved April 23, 1897, it was provided as follows:

"Section 1. That section 5459 [the general exemption statute] of the general statutes 1894 be and the same is hereby amended by adding thereto the following subdivision:

"Twelfth—All moneys derived or received by any

surviving wife or child from any form of life insurance upon the life of any deceased husband or father not exceeding ten thousand dollars."

Minn. Laws 1897, Chapter 354, p. 620, April 23, 1897.

Mason's Minnesota Statutes 1927, Sec. 9447.

This statute was reenacted in 1941 with slight immaterial verbal variations, as follows:

"14. All *money* received by, or payable to, ~~the~~ surviving wife or child from insurance upon the life of a deceased husband or father, not exceeding \$10,000."

Session Laws of Minnesota, passed during the 52d Session of the State Legislature, Chapter 351—S. F. No. 1381, page 644.

It is to be observed that these two statutes are in direct conflict, in this: that the Act of 1895 purports to exempt all life insurance, whereas the Act of 1897 exempts only \$10,000 of life insurance.

In considering the applicability, if any, of these two statutes, or either of them, to the facts of this case it is important to bear in mind the fundamental nature of this case as an action *in rem* against property, although in form an action *in personam*. If we are correct in our contention that this is an action *in rem* against property, that is, the property of John W. Pauling, deceased, alleged to have been conveyed to his second wife in fraud of the rights of petitioner as a creditor, then it is obvious that neither the Act of 1895 nor the Act of 1897 can have any possible application to this case.

An exemption is an exemption to somebody. That somebody is the debtor, that is John W. Pauling, deceased, and his estate. *Respondent is not the debtor.*

### **Dead Men Have No Exemptions.**

*The exemption, if any, under either of these statutes is an exemption to a dead man and dead men have no exemptions.*

"A statute which makes no express provision for the survival of the right of exemption after the death of the debtor has been construed not to give the exemption right to the surviving widow or children."

35 C. J. S. p. 28.

### **The Act of 1895 Was Superseded and by Implication Repealed by the Act of 1897.**

In the early case of *In re Mary M. How, Insolvent*, 59 Minn. 415, 61 N. W. 456, the Supreme Court of Minnesota held that a statute exempting all life insurance funds was unconstitutional as being unreasonable as to the amount under Section 12 of Article 1 of the Constitution of Minnesota. However, on rehearing it was held that the act was not unconstitutional in that particular case in reference to that particular bankrupt, but the court said:

"To this extent, and to this extent only, we modify the former opinion in this case."

*In re How, Insolvent*, 61 Minn. 217, p. 218, 63 N. W. 627. For a copy of Sec. 12, Art. I, of the Constitution of Minnesota see Appendix "A".

It seems probable that when the legislature passed the Act of 1895 it did not know of, or at least its attention was not directed to, the prior decision in *re How, Insolvent*, 59 Minn. 415, 61 N. W. 456, and that the Act of 1897 exempting life insurance only to the amount of \$10,000 was passed for the purpose of correcting the constitutional infirmity in the Act of 1895.

As to these two statutes we find a very peculiar situation in the decisions of the Supreme Court of Minnesota.

In sundry cases the statute of 1895 has been cited and applied and no reference whatever made to the statute of 1897 and in sundry cases the statute of 1897 has been cited and applied with no reference made to the statute of 1895. There is no case which considers the question as to whether the statute of 1897 supersedes the statute of 1895, and there is no case in Minnesota in which an exemption claimed appears to have been in excess of \$10,000 after the enactment of the statute of 1897.

There is no case which defines the function of either statute as distinguished from the function of the other.

*Rose v. Marchessault*, 146 Minn. 6, 177 N. W. 658.

*Murphy v. Casey*, 150 Minn. 107, 184 N. W. 783.

*First National Bank v. Schneider*, 179 Minn. 255, 256, 228 N. W. 919.

*Cook v. Prudential Ins. Co.*, 182 Minn. 496, 235 N. W. 9.

*Kassmir v. Prudential Ins. Co.*, 191 Minn. 340, 254 N. W. 446.

*Ross v. Simser*, 193 Minn. 407, 258 N. W. 582.

We will not burden the court with a detailed review of all the Minnesota cases that have been decided by that court, which has interpreted either one or the other of these two statutes, but we rest, for the time being upon the foregoing general statement.

If the petition for the writ is granted, the foregoing cases will be analyzed more in detail to demonstrate the accuracy of the above generalization that "there is no case which defines the function of either statute as distinguished from the function of the other."

**If the Act of 1895 Can be Construed as Exempting All Life Insurance it Is Unreasonable as to Amount and Is, Therefore, Unconstitutional and Void Under the Provisions of Sec. 12, Art. I of the Constitution of Minnesota (See Appendix "A").**

*In re How, Insolvent*, 59 Minn. 415, 61 N. W. 456.

*In re How, Insolvent*, 61 Minn. 217, 63 N. W. 627.

Obviously the Legislature of Minnesota, by the Act of 1897 limiting the exemption to \$10,000, was of the opinion that \$10,000 was the maximum of what would be reasonable under the Constitution.

*If either of these two statutes, the one of 1895 or 1897, is applicable it is the Statute of 1897 which exempts life insurance only to the amount of \$10,000.*

**Life Insurance Is Property, and, Therefore Subject to the Fraudulent Conveyance Rules.**

*Grigsby v. Russell*, 222 U. S. 149, 36 L. R. A. (N. S.) 642, Am. Cas. 1913, p. 863.

A. L. R. p. 1036.

*Bankers Reserve Life v. Matthews*, 39 Fed. 2d, p. 528.

*Rahders v. Peoples Bank*, 113 Minn. 496, 499, 130 N. W. 16.

*Hawley v. Aetna Life*, 291 Ill. 28, 33, 34, 125 N. E. 707.

*Love v. First National Bank*, 228 Ala. 258, 153 So. 189:

"Life insurance is deemed a species of property, the subject of fraudulent conveyance. A policy taken out and premiums paid for by a debtor for the benefit of a named beneficiary as a gift is property subject to the law of voluntary conveyances, constructively fraudulent as against his existing creditors." (p. 261.)

### **Position of the Court Below Stated and Analyzed.**

The court says: "Since appellant was never a creditor of appellee, Section 9447 (the Act of 1897) has no application in the present case" (R. 74, 75).

This shows a fundamental misapprehension on the part of the court of the nature of the case. Of course "appellant was never a creditor of appellee" in the sense that appellee (respondent here) is personally and individually indebted to appellant (petitioner here). Respondent was never decreed to pay petitioner anything, she never agreed to pay petitioner anything. While the action in form is an action *in personam*, because respondent is in possession of property subject to the payment of petitioner's debt, respondent is the only person that can be sued. The suit is against the property of John W. Pauling fraudulently conveyed by him to his wife without any consideration. John W. Pauling is the debtor and the suit is against John W. Pauling's property, respondent being sued only because she is in possession of the property. If the court should hold that petitioner is entitled to recover a sum in excess of the value of the property respondent has received, obviously, no judgment could be rendered against respondent for the excess. **The fact that "appellant was never a creditor of appellee" is the very reason why none of the Minnesota exemption statutes has any application to this case.**

## POINT IX.

**THE CASE OF ROSS v. MINNESOTA LIFE INSURANCE CO., 154 MINN., 186, 191 N. W. 428, 31 A. L. R. 46, IN WHICH IT IS HELD THAT A PERSON, THOUGH INSOLVENT, "MAY DEVOTE A MODERATE PORTION OF HIS EARNINGS TO INSURE HIS LIFE IN FAVOR OF HIS WIFE" IS NOT APPLICABLE TO THE FACTS OF THIS CASE.**

This case is cited by the court below (R. 76).

In the Ross case the court said "the amount of such insurance was not excessive or unreasonable for the protection of the widow and minor children of the insured" (p. 190). The court laid emphasis upon the financial condition of the widow and the number of children dependent upon her for support. "Plaintiff was left without a home of any sort, and without any means of support, save her ability to labor; the children were all minors excepting one; six were wholly dependent upon the plaintiff and the other minor ones were partially so. Under such circumstances we see no reason for disturbing the conclusion arrived at by the learned trial court in relation thereto" (pp. 190-191).

It thus appears that the facts in the Ross case are totally different from the facts in the case at bar. In the first place, the respondent here has no children (R. 38); she will have ample means for her support out of the \$72,301.90, the value of the property she has received, after paying petitioner's claim.

The amount of premiums paid in the Ross case was \$936. The amount of premiums paid by Pauling on insurance payable to respondent was \$21,503.98 (R. 36).

## POINT X.

THE CASE OF IRVINE v. HELVERING, 99 FED. 2ND 265 (U. S. C. C. A. 8TH) IS NOT IN POINT. (Cited by the Court Below (R. 69).)

The court cited and relied upon this case in holding that the property left by Pauling, other than the life insurance, was not subject to the payment of his debts.

In the first place, concerning this case it is to be observed that the facts are totally different from the facts in the case at bar.

Irvine and his wife held certain stocks in joint tenancy. A deficiency assessment for income tax was levied against Irvine *after his death*. The Commissioner of Internal Revenue sought to collect this deficiency assessment from Mrs. Irvine. The court held she was not liable. Concerning this case it is first to be observed that the question most discussed by the court was the question as to whether or not a joint tenancy had been created. Irvine died May 14, 1932. The deficiency assessment was not made *until more than two months after Irvine's death*, to-wit: July 16, 1932. There was, therefore, no debt at the time of the creation of the joint tenancy *and there was no debt at the time of Irvine's death*.

There is no discussion of the principles of fraudulent conveyance except the following:

"The second contention of the respondent finds no evidentiary support in the record. The record conclusively shows that C. G. Irvine was at all times solvent, *that the creation of the joint tenancies did not make his insolvent*, and that he could not have had any intent to hinder, delay or defraud his creditors. *In fact, the record fails to show that, during his lifetime, C. G. Irvine had any debts of which he was aware*. He was free to dispose of his property in any way that he saw fit. *McDonald v. Williams*, 147 U. S. 397, 400, 401, 404, 19 S. Ct. 743, 43 L. ed. 1022. The burden of establish-

ing that the creation of these joint tenancies rendered C. G. Irvine insolvent, or that the transfers were made with intent to defraud his creditors, so that the petitioner, upon his death, became a transferee and liable for his unpaid income taxes, was upon the Commissioner. Sec. 602 of the Revenue Act of 1928, 45 Stat. 873, 26 U. S. C. Sec. 619, 26 U. S. C. A. Sec. 619. *Troll v. Commissioner*, 33 B. T. A. 598, Sections 8478 and 8481 of Mason's Minnesota Statutes 1927 are clearly inapplicable, there being no evidence of either fraud or insolvency" (pp. 268, 269, italics ours.)

Special attention is called to the fact that what the court here said about the burden of proof, rests solely upon an applicable federal statute relating to the collection of deficiency income tax assessment levies and, therefore, as the court says, "Sections 8478 and 8481 of Mason's Minnesota Statutes 1927" (casting the burden of proof upon the grantor in case of voluntary conveyance by husband to wife), "are clearly inapplicable."

The provision of the federal statute cited by the court in the *Irvine* case reads as follows:

"In proceedings before the Board the burden of proof shall be upon the Commissioner to show that a petitioner is liable as a transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax."

26 U. S. C. A. Sec. 1119 (a) p. 281, erroneously cited by the court in the *Irvine* case as

26 U. S. C. A. Sec. 619.

### **The Creation of a Joint Tenancy or a Tenancy by Entirety Is Within the Fraudulent Conveyance Rules.**

This point has to do with the property other than the life insurance.

Our research fails to disclose any case where the question as to whether or not the creation of a joint tenancy is within the fraudulent conveyance rules has been passed

upon, but there is ample authority to the effect that the creation of a tenancy by entirety is within the fraudulent conveyance rules.

The only difference between a joint tenancy and a tenancy by entirety is that a joint tenancy may be created with reference to any property, whereas a tenancy by entirety is limited to real estate and is limited to conveyances to husband and wife.

A tenancy by entirety is within the fraudulent conveyance rules.

4 Thompson on Real Estate, Permanent Ed. Sec. 1825, p. 364.

*Detroit BC&WRR v. Lavell*, 224 Mich. 572, 195 N. W. 58.

*Lemerise v. Robinson*, 241 Mich. 528, 217 N. W. 911.

*Whetstone v. Coslick*, 117 Fla. 203, 157 So. 666, 96 A. L. R. 455.

#### POINT XI.

**WHERE A MAN, AS IN THIS CASE, THOUGH SOLVENT IN HIS LIFETIME, BY CONVEYANCES TO HIS WIFE, EITHER IN THE FORM OF CREATING JOINT OWNERSHIP IN HIMSELF AND WIFE WITH SURVIVORSHIP IN HER OR IN THE FORM OF LIFE INSURANCE PAYABLE TO HER, PUTS ALL OF HIS PROPERTY IN SUCH SHAPE THAT IN CASE OF HIS DEATH HIS ESTATE WILL BE INSOLVENT, THIS SITUATION PRESENTS A CASE OF FRAUDULENT CONVEYANCES WITHIN THE MEANING OF THE FRAUDULENT CONVEYANCE RULES AS EMBODIED IN THE UNIFORM FRAUDULENT CONVEYANCE ACT.**

The applicable provision of the Uniform Fraudulent Act reads as follows:

"Every conveyance made and every obligation incurred by a person who is *or will be thereby rendered insolvent* is fraudulent as to creditors *without regard to his actual intent*, if the conveyance is made or the

obligation is incurred without a fair consideration."  
(Italics ours.)

2 Minn. Stat. Sec. 513.23, p. 3365.

2 Mason Sec. 8478, January 1, 1922.

Observe the words "or will be thereby rendered insolvent." Do these words mean "or will be thereby rendered insolvent" *in his lifetime*? There is no possible logical reason for so interpreting this language. The obvious meaning is—that will render him insolvent, so that his creditors cannot collect; if so, the word "insolvent" extends to the insolvency of his estate.

Strange to relate, so far as we can discover, this question, although important and fundamental, has never been decided in any reported case.

If a man can lawfully, in his lifetime though solvent, put all of his property in such shape that nothing will be left for his creditors in case of his death, it is certainly something new, startling and revolutionary in English and American jurisprudence. Such a proposition certainly would shock the conscience of the chancellor.

The court below, by affirming the judgment on an agreed statement of facts, has in effect decided that this precise thing can lawfully be done.

If this is the law, a man might have a million dollars' worth of property and five hundred thousand dollars of debts and by the simple device of putting all of his property in joint tenancy or in the form of life insurance payable to his wife, could prevent his creditors from collecting anything in case of his death. **We think this question is of vital importance to all the people of the United States and comes within the meaning of the language of Rule 38 (b) of this court:**

"\* \* \* or has decided an important question of local law in a way probably in conflict with applicable local decisions."

## POINT XII.

IF THE COURT SHALL HOLD THAT THE EXEMPTION ACT OF 1895 PURPORTING TO EXEMPT ALL LIFE INSURANCE IS STILL IN FORCE (SEE POINT VIII), AND IF THE COURT SHALL HOLD FURTHER THAT THIS STATUTE IS CONSTITUTIONAL NOTWITHSTANDING THE DECISION OF THE SUPREME COURT OF MINNESOTA IN RE HOW, INSOLVENT, 59 MINN. 415, 61 N. W. 456; 61 MINN. 217, 63 N. W. 627 (SEE POINT VIII), AND IF THE COURT SHALL FURTHER HOLD THAT THIS STATUTE IS APPLICABLE TO THIS CASE NOTWITHSTANDING THE ACT OF 1897 (SEE POINT VIII). IN OTHER WORDS, IF THE COURT SHALL HOLD THAT RESPONDENT AND NOT JOHN W. PAULING IS THE DEBTOR THEN, IN SUCH EVENT, PETITIONER PRESENTS THE ALTERNATIVE THEORY THAT PREMIUMS PAID BY PAULING ON THE LIFE INSURANCE PAYABLE TO RESPONDENT WERE PAID IN FRAUD OF THE RIGHTS OF PETITIONER AND MAY BE RECOVERED BY PETITIONER, WITH INTEREST AT 6% PER ANNUM.

The cases in support of this proposition are the cases which discuss the general principles of fraudulent conveyances and are found under Point VI.

The Act of 1895 (being the Act relied upon by respondent as creating an exemption in her favor) provides as follows:

"When any insurance is effected in favor of another, the beneficiary shall be entitled to its proceeds against the creditors and representatives of the persons effecting the same. *All premiums paid for insurance in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the policy; if the company be specifically notified thereof, in writing, before payment.*" (Italics ours.)

Minn. Statutes 1941, Sec. 61.14, or 1 Mason, Sec. 3387, Oct. 1, 1895.

It is agreed that the premiums paid by Pauling on the life insurance payable to respondent, with interest computed to January 1, 1945, amounted to \$33,045.97 (R. 36). The notice provided for by the foregoing statute was waived by respondent (R. 36).

This point is not discussed by the court below.

### POINT XIII.

#### UNWARRANTED PRESUMPTIONS TO NULLIFY THE DECREE, WHICH IS ALSO A CONTRACT.

On the last page of the opinion (R. 77) the court unwarrantably piles presumptions on presumptions to nullify the effect of the decree as said decree has been construed by the Supreme Court of Illinois in the parallel cases of *Smith v. Smith*, 334 Ill. 370, 166 N. E. 85, 88, and *Storey v. Storey*, 125 Ill. 608, 18 N. E. 329, 331.

To justify these presumptions the court cites the case of *Storey v. Storey*, 125 Ill. 608 (R. 77), but the court wholly ignores the fact that the primary basis of the decision in the *Storey* case was the fact that the decree was a consent decree.

"While it is true that husband and wife cannot lawfully enter into an agreement for divorce, yet it is well settled that the amount of alimony which the husband is to pay to the wife, and the terms of the payment, and the length of time during which such payment is to continue, may be all arranged between them by consent. In *Buck v. Buck*, 60 Ill. 242, the recitals of the decree showed that the whole question of alimony was fixed and settled by the agreement of the parties, and it was there held that it was competent for the husband to consent to the provisions of the decree, and that, having done so, he was bound

by them, and could have no relief against his own voluntary agreement. Where the court has jurisdiction of the subject, the consent of the parties will authorize it to enter a valid decree or judgment in accordance with their agreement. Where husband and wife agree upon alimony, the court will embody their agreement upon that subject in its decree. *Stratton v. Stratton*, 77 Me. 377; *Fletcher v. Holmes*, 25 Ind. 458; *Carson v. Murray*, 3 Paige 483; *Miller v. Miller*, 64 Me. 484. The decree for alimony entered in the case at bar was a consent decree."

*Storey v. Storey*, 125 Ill. 608, 18 N. E. 329, 331.

#### POINT XIV.

##### ALLEGATION OF CONSPIRACY IN THE COMPLAINT.

It will be contended on behalf of respondent that there was an allegation in the complaint (Par. 5, R. 2, 3) of conspiracy to prevent petitioner from collecting her alimony and it will be said that there was no direct evidence of such conspiracy. The facts having been subsequently agreed upon, the pleadings become immaterial and the case should be decided upon its merits as disclosed by the agreed statement of facts, but, in any event, a conspiracy was proven by the presumptions arising by reason of the authorities cited under Point IV. Furthermore, **Supreme Court Rule 8 (c)** fully sanctions alternative theories in the pleadings and further provides (f) "all pleadings shall be so construed as to do substantial justice."

**Conclusion.**

It is therefore respectfully submitted that this case is one for the exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

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**Appendix "A."****SECTION 12, ARTICLE I, CONSTITUTION OF MINNESOTA,  
October 13, 1857.****IMPRISONMENT FOR DEBT. Property Exemption.**

SECTION 12. No person shall be imprisoned for debt in this State, but this shall not prevent the Legislature from providing for imprisonment, or holding to bail, persons charged with fraud in contracting said debt.

A reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability. The amount of such exemption shall be determined by law.

(Provided, however, that all property so exempted shall be liable to seizure and sale for any debts incurred to any person for work done or materials furnished in the construction, repair or improvement of the same, and provided further, that such liability to seizure and sale shall also extend to all real property for any debt incurred to any laborer or servant for labor or services performed.) (Emphasis on the word "reasonable" ours.)